IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 850 OF 2003

Shri Jaydeep Jaywant Chaudhary. ... Appellant.

V/s.

1. Shri Sharad Krishnajirao Raut,

2. M/s.Arihant Enterprises. ... Respondents.

Mr.R.S.Apte with M.S.Lagu for the appellant.

T.M.Joshi for respondent No.2.

CORAM : A.S.Oka, J.

DATED : 7th March, 2005.

ORAL JUDGMENT :

. This Appeal is preferred by the original Plaintiff - Appellant for challenging the judgment and order dated 2nd September 2003 passed by the learned trial Judge. By the impugned order, the learned Judge has answered the issue of jurisdiction against the Appellant - Plaintiff and has ordered the return of the plaint.

2. By filing Short Cause Suit No.3585 of 2001 the Appellant seeks enforcement of agreement dated 30th March 2000 (hereinafter referred to as the "suit agreement" for short) executed in his favour by the Respondent No.1. The said agreement is relating to sale of flat No.101 more particularly

described in paragraph-2 of the plaint. There is a document executed by the Respondent No.1 in favour of Respondent No.2 dated 6th July 2001 by which the entire property on which the flat is situated was transferred in favour of the Respondent No.2. On the basis of the said agreement a prayer was made in the suit that the suit agreement dated 30th March 2000 is also binding upon the Respondent No.2.

3. A notice of motion for interim relief was taken out by the Appellant to which reply was filed by the Respondent No.2 in which a contention was raised that if the suit was properly valued for jurisdiction the valuation thereof will be more than Rs.50,000/- and, therefore the City Civil Court will not have jurisdiction to entertain and try the suit.

4. The learned trial Judge framed following issue which was decided as preliminary issue.

> "1. Does defendant no.2 prove that the suit is undervalued, and if the suit is properly valued it shall be beyond the pecuniary jurisdiction of this court, and as such this court will have no jurisdiction to try and entertain the same?

5. The contention before the trial Court was that the suit agreement was subject to the provisions of the Maharashtra Ownership Flats

(Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as the "said Act of 1963 for short) and, therefore the suit filed by the Appellant was in substance for enforcing the statutory obligations of the Respondents under the said Act of 1963. The Appellant contended that since the suit is for enforcing statutory obligations of the Respondents under the said Act of 1963, it will be governed by the section 6(iv)(j) of the Bombay Court Fees Act, 1959 (hereinafter referred to as the "said Act of 1959" for short) and, therefore the suit has been rightly valued at Rs.1,200/- for the purposes of court fee and jurisdiction. The contention of the Respondent No.2 appears to be that the value of the suit flat shown in the said agreement is Rs.4,50,000/-. It was further contended by Respondent No.2 that the transaction covered by the suit agreement will not attract the provisions of the said Act of 1963 and, therefore section 6(iv)(j) of the said Act of 1959 will have no application to the suit.

6. The learned trial Judge held that there was no privity of contract between the Appellant and the Respondent No.2. The learned Judge has also held that the transaction between the Appellant and the

Respondent No.1 will have to be treated as normal transaction as regards the sale of the flat and the said transaction will not be governed by the provisions of the said Act of 1963. It was also held that the said agreement is not the agreement entered into by and between the Appellant and the Respondent No.2 under the provisions of section 4 of the said Act of 1963. The learned Judge also recorded finding that the suit agreement dated 30th March 2000 was between a person who intends to develop the property and sell a flat to a particular person. The learned Judge proceeded further to hold that the said agreement was not in conformity with the requirements set out by the judgment of this Court reported in 1990 Mh.L.J. 445 (**Maria Philomena Pereira v. Messrs. Rodrigues Construction**)

7. The learned counsel appearing for the Appellant submitted that in view of the agreement executed by the Respondent No.1 in favour of Respondent No.2, the Respondent No.2 has stepped in shoes of the Respondent No.1. He submitted that there is a finding recorded in paragraph-9 of the impugned order that the Respondent No.1 was a person who was intending to develop the property. He submitted that in view of the document dated 6th July 2001 executed by and between Respondent No.1

and Respondent No.2, the Respondent No.2 was bound to perform the obligations of the Respondent No.1 under the suit agreement.

8. The learned counsel appearing for the Respondent No.2 submitted that the Respondent No.2 cannot be a Promoter within the meaning of the said Act of 1963 and therefore there was no question of the Appellant enforcing the obligations under the said Act of 1963 as against the Respondent No.2. He, therefore, submitted that the findings recorded by the learned trial Judge are correct and no interference with the impugned order is called for.

9. I have considered the rival submissions. The preliminary issue of jurisdiction raised by the Respondent No.2 was really based on alleged improper valuation of the suit made by the Appellant - Plaintiff in so far as jurisdiction and court fee are concerned. According to the Appellant, the suit agreement dated 30th March 2000 was an agreement covered by the provisions of the said Act of 1963 which was executed by the Respondent No.1 who was a Promoter within the meaning of section 2(c) of the said Act of 1963. According to the Appellant - Plaintiff, in view of the agreement dated 6th July 2001 executed by the Respondent No.1

in favour of the Respondent No.2, the Respondent No.2 has stepped in the shoes of the Promoter i.e. Respondent No.1 and, therefore the Respondent No.2 was bound by the said agreement.

10. The learned trial Judge has recorded finding in paragraph-9 of the impugned order that the Respondent No.1 was intending to develop the property, however, the agreement dated 30th March 2000 was not in conformity with the provisions of the said Act of 1963. Thus the findings recorded by the learned trial Judge is that the Respondent No.1 was a Promoter within the meaning of section 2(c) of the said Act of 1963, obviously, because the Respondent No.1 was proposing to construct a block or building or flats for the purpose of sale of at least some of the flats to other persons. Once it was held that the Respondent No.1 was a Promoter within the meaning of the said Act of 1963, merely because the agreement is not in conformity with the form prescribed by the said Act of 1963 or the rules framed thereunder, it cannot be said that the Respondent No.1 was under no obligation to perform the obligations under the said Act of 1963.

11. In paragraph-10 of the impugned judgment and order, the learned trial Judge has recorded a

finding that there is no privity of contract between the Appellant and the Respondent No.2. The learned Judge observed that the suit property has been sold by the Respondent No.1 by a document dated 6th July 2001 executed in favour of the Respondent No.2. It is not clear from the impugned order whether the document of transfer dated 6th July 2001 was produced before the Court and was proved in accordance with the provisions of the Indian Evidence Act, 1872. Whether the Respondent No.2 is bound by the obligations of the Respondent No.1 or not can be decided only by interpreting the document dated 6th July 2001. It is not clear from the impugned order whether the learned Judge granted opportunity to both the parties to lead evidence in so far as the preliminary issue is concerned. It is very difficult to understand as to how the learned Judge has recorded finding regarding relationship between the Respondent No.1 and the Respondent No.2 without any of the parties proving the document dated 6th July 2001.

12. The issue of jurisdiction related to valuation of the suit filed by the Appellant.

Section 8 of the said Act of 1959 reads thus:

"**8. Inquiry as to valuation of suits**. If the Court is of opinion that the subject-matter of any suit has been wrongly

> valued or if an application is made to the Court for the revision of any valuation made, the Court may revise the valuation and determine the correct valuation and may hold such inquiry as it thinks fit for such purpose.

Section 8 contemplates that the Court is obliged to hold an enquiry before recording a finding regarding valuation. When the preliminary issue of jurisdiction was being decided, the learned trial Judge should have given an opportunity to both the parties to lead evidence so that by proving necessary documents real relationship between the Appellant and the Respondent No.1 and between Respondent No.1 and Respondent No.2 could have been established. However there is nothing on record to show that opportunity to lead evidence was given to the parties. In this case, the preliminary issue could not have been decided without giving opportunity to the parties to lead evidence and without holding an enquiry under section 8 of the said Act, 1959. In this view of the matter, the impugned order is unsustainable and the same deserves to be quashed and set aside. The suit will have to be remanded to the trial Court to decide preliminary issue afresh after granting opportunity to both the parties to lead evidence.

13. Hence I pass the following order:

O R D E R

(i) The impugned judgment and order dated 2nd September 2003 is quashed and set aside.

(ii) The learned trial Judge will decide the issue of jurisdiction, which is already framed, afresh after giving an opportunity to both the parties to lead evidence.

(iii) The learned trial Judge will decide the issue afresh in the light of the observations made in this judgment and order.

14. The Appeal is disposed of in the above terms with no order as to costs.

15. The parties and the concerned Court to act on an authenticated copy of this order.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 1242 OF 2003
IN
APPEAL FROM ORDER NO. 850 OF 2003

Shri Jaydeep Jaywant Chaudhary. ... Appellant.

V/s.

1. Shri Sharad Krishnajirao Raut,

2. M/s.Arihant Enterprises. ... Respondents.

Mr.R.S.Apte with M.S.Lagu for the appellant.

T.M.Joshi for respondent No.2.

CORAM : A.S.Oka, J.

DATED : 7th March, 2005.

ORAL JUDGMENT :

. In view of disposal of the Appeal, this Civil Application does not survive. The Civil Application is rejected.

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